United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-5020

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

In the Matter

of

ISRAEL-BRITISH BANK (LONDON) LIMITED,

Bankrupt

P/S

ISRAEL-BRITISH BANK (LONDON) LIMITED,

Appellant,

FEDERAL DEPOSIT INSURANCE CORPORATION, successor in interest to Franklin National Bank and BANK OF THE COMMONWEALTH,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT, ISRAEL-BRITISH BANK (LONDON) LIMITED IN REPLY TO BRIEF OF APPELLEE, FEDERAL DEPOSIT INSURANCE CORPORATION AND BRIEF OF APPELLEE, BANK OF THE COMMONWEALTH

KRAUSE, HIRSCH & GROSS
Attorneys for Appellant
41 East 42nd Street
New York, New York 10017
(212) 986-1122

Of Counsel:
JACK GROSS
SHELDON LOWE
BRUCE L. HELLER

4

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter

of

ISRAEL-BRITISH BANK (LONDON) LIMITED,

Bankrupt.

ISRAEL-BRITISH BANK (LONDON) LIMITED,

Appellant,

FEDERAL DEPOSIT INSURANCE CORPORATION as successor in interest to Franklin National Bank and BANK OF THE COMMONWEALTH,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT, ISRAEL-BRITISH BANK (LONDON) LIMITED ("IBB") IN REPLY TO BRIEF OF APPELLEE, FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC") AND BRIEF OF APPELLEE, BANK OF THE COMMONWEALTH ("COMMONWEALTH")

Preliminary Statement

This reply brief is addressed to both the FDIC brief and the Commonwealth brief.*

---

* Page references to the Appellees' briefs are designated "FDIC p. " or "Commonwealth p. ". Page references to Appellant's brief are designated "IBB p. ". References designated (A-) are to the Joint Appendix.

Statement of the Issue Presented for Review

The issue presented for review is fully and accurately set forth at page 2 of IBL's brief. The Counter-Statement of the Issue Presented for Review set forth at TIC p. 1 and the Statement of Issue Presented for Review set forth at Commonwealth p. 2 are inadequate and inaccurate in that they conspicuously omit the fact that IBB, a foreign banking corporation, never had a place of business, office or agent in the United States (A-54), never qualified to do business as a banking corporation in the United States (A-54, A-35); never did business in the United States as a banking corporation (A-54) and never was subject to the jurisdiction of any banking authority in the United States —national or state (A-35) but merely has property in the Southern District of New York, consisting of deposits in various banks (A-54).

Statement of the Facts

IBB stands on its Statement of the Facts as set forth at pages 3 and 4 of its brief. The Court's attention is respectfully directed to the following significant omissions of relevant facts from the Commonwealth Statement of the Case (Commonwealth pp. 2-4):

(a) IBB never had a place of business, office or agent in the United States;

(b) IBB never qualified to do business as a banking corporation in the United States;

(c) IBB never did business in the United States as a banking corporation;

(d) IBB never was subject to the jurisdiction of any banking authority in the United States, national or state;

(e) IBB filed a voluntary petition for the winding up of its affairs in the appropriate court in the United Kingdom and an order directing such winding up and appointing an official receiver and liquidator of the property of IBB was duly entered in such proceeding;

(f) IBB has numerous creditors, both in the United States and abroad;

(g) the liens referred to by Commonwealth (Commonwealth p. 2) resulted from attachments made within four months of the filing of IBB's voluntary bankruptcy petition.

In refutation of FDIC's statement concerning IBB's alleged "proliferation in its Brief of facts concerning the levels of its past and present activities in the United States", IBB submits that there is no reference in IBB's brief to levels of past and present activities in the United States for the simple reason that there were none. IBB merely had funds on deposit in certain banks located in New York City.

POINT I

Within the meaning of the Bankruptcy Act, a banking corporation is a corporation created to engage in banking activities or licensed to so engage, by national or state sovereign authority, under the supervision and control of the creating authority.

It is undisputed among the parties to this appeal that banking corporations within the meaning of the Bankruptcy Act (the "Act") are corporations created to engage in banking activities or licensed to so engage by national or state sovereign authority under the supervision and control of the creating authority.

The point of departure between IBB and the appellees is whether the aforesaid definition does or does not encompass a banking corporation created pursuant to the sovereign authority of a foreign nation which does not and did not, in fact engage in banking activities within the United States nor was it ever so licensed nor was it ever subject to the supervision and control of any banking authority within the United States, national or state, and whose only relationship to the United States has been as a depositor of funds in banks located in New York City.

What is tantamount to an incantation* in the citations, quotations and arguments of the FDIC brief and the Commonwealth brief, of the words "banking corporation" as a basis for excluding IBB from among those corporations who may file a voluntary petition under the Act begs the very point at issue. To say that a bank is a bank is a bank, without addressing the question of the nature and operation of the subject corporation within the United States adds nothing to the resolution of the issue and "* * * twice told is full of sound and fury, signifying nothing."

The appellees' contention (FDIC p. 4, Commonwealth pp. 4-5) that the statute is not ambiguous in the exclusionary language is incorrect. What is ambiguous is the word "banking". It is not true that a bank is a bank is a bank.

The reported cases under the Act propose three different definitions or tests:

(1) Whether it is classified as a bank under the laws of its State of incorporation ("State" meaning a State of the United States);

(2) Whether it has conventional banking powers;

---

* See FDIC pp. 5, 7, 8, 9, 13, 34, 35 and Commonwealth pp. 5, 6, 7, 10, 22, 32, 40.

(3) Whether its activities are those of a conventional bank.

With respect to whether or not it is classified as a bank under the laws of its State of incorporation, this court in *In Re Prudence Co., Inc.*, 79 F. 2d 77, 79 (2d Cir.) *cert. den.* 296 U.S. 646 (1935) held:

> "* * * all of the cases, so far as we are advised, which have construed the words 'banking corporation' as used in the Bankruptcy Act, have regarded the legal power to receive deposits as the essential thing. * * * Without departing from the principle that the character of a corporation is to be determined by the character of its charter powers, we may, and do, hold that the debtor was not a "banking corporation.'" (citations omitted)

This result was arrived at despite the fact that the debtor was incorporated under the Banking Law of the State of New York.

IBB did not have the legal power to receive deposits in the United States nor did it in fact receive deposits in the United States. Hence, the necessity to protect depositors, the very thrust of the exclusion, was not and is not present.

Dean Sovern called the definition adverted to in the *Prudence* case the "state classification test". Sovern, *Sec. 4 of the Bankruptcy Act: The Excluded Corporations*, 42 Minn. L. Rev. 171 (1957). He refers to the holdings of this Circuit and some of the other Circuits to the effect that whether or not a corporation is a banking corporation (or one of the other classes of corporations excluded under Section 4 of the Act) depends entirely and conclusively on whether the State of incorporation has classified it as a bank.

With respect to whether banking powers determine if a corporation is a banking corporation, other courts have held or suggested that, either alternatively or additionally, to be a bank, a corporation must *have the power to receive deposits.* See, Sovern, *supra,* at 191-193; 1 Collier, *Bankruptcy,* Section 4.05 (14th ed. 1974); *Clemons* v. *Liberty Sav. & Real Estate Corp.,* 61 F.2d 448, 450 (5th Cir. 1932); *In re Bay Cities Guar. Bldg.-Loan Ass'n,* 48 F.2d 623, 624-25 (S.D. Cal. 1931). The Eighth Circuit, very early, adopted the meaning "A corporation empowered to do a banking business." *Gamble* v. *Daniel,* 39 F.2d 447, 450 (8th Cir.), *appeal dismissed,* 281 U.S. 705, *cert. denied,* 282 U.S. 848 (1930). However, it disclaimed expressing a view as to the situation where the corporation was empowered to do a banking business and other business and was doing no banking business. *Id.* Sovern expresses the view that, in such case, the corporation should not be classified as a banking corporation and says *activities, not powers,* should control. Sovern, *supra* at 202-203. Two district courts have expressed this view. See *In re Supreme Lodge of the Mason's Annuity,* 286 F. 180, 183 (N.D. Ga. 1923); *In re Fidelity Assur. Ass'n,* 42 F.Supp. 973 (S.D. W.Va. 1941), *rev'd,* 125 F.2d 442 (4th Cir. 1942), *aff'd,* 318 U.S. 608 (1943).

With respect to whether the activities of IBB were those of a conventional bank within the compass of banking activities set forth in *The Mercantile Bank* v. *New York,* 121 U.S. 138 (1887); *Marvin* v. *Kentucky File Trust Co.,* 218 Ky. 135, 291 S.W. 17, 18 (1927); *Warren* v. *Shoo[illegible]* 91 U.S. 704 (1876), that is, the business of receiving money on deposit, lending money, discounting notes for circulation, collecting money on notes deposited, negotiating bills and similar activity, IBB was not engaged in banking in

the United States and therefore was not a banking corporation.

The ambiguity stems in part from the complete absence of a definition of the word "banking" in the Bankruptcy Act. Even where a statute has attempted to define the word "banking", definitions vary from statute to statute. The Internal Revenue Code of 1954, Sec. 581 defines "bank" as a bank or trust company incorporated and doing business under the laws of the United States, or any state or of any territory, a substantial part of the business of which consists of receiving deposits, making loans, discounts, etc. According to the Bank Holding Act of 1956, 12 U.S.C. Sec. 1841(c) (1970), "Bank means any institution that accepts deposits that a depositor has a legal right to withdraw on demand, but shall not include * * * *any organization that does not do business within the United States.*" (emphasis added) Uniform Commercial Code, Sec. 1-201(4) defines "bank" as any person engaged in the business of banking. It follows, therefore, that the term "banking corporation" is not unambiguous and does not have an immutable meaning either within or without the context of the Act.

"If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule with no purpose or objective is nonsense * * *" Llewellyn, *The Common Law Tradition* 374 (1960).

Because of the ambiguity of the statute, we must seek the purpose or objective in Congressional intent and judicial interpretation. This IBB has done in its main brief under Point II where it concluded (IBB p. 19) that:

> 1. The reason for the exclusion of national banks was the existence of alternative legislation which regulated their supervision and liquidation.

2. The reason for the exclusion of state banks was that "there are chapters on chapters of the statutes regulating to the smallest minutia the proceedings" in case of insolvency.

3. Banks partook of a public or quasi-public nature which warranted their estates being administered through alternative legislation.

4. The excepted corporations function almost exclusively in local communities and their administration should be left to local courts.

Parenthetically, there was Congressional awareness that even the meaning of words and phrases set forth in Section 1 of the Act (11 U.S.C. Sec. 1) might be imprecise and the section was introduced with the following:

> "The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same shall be inconsistent with the context, be construed as follows: * * *"

It is appropriate at this point to reply to the argument urged in the FDIC brief at pp. 7, 8 and the Commonwealth brief at pp. 6-8 that IBB is seeking to impute a different meaning to the word "corporation" when it appeared twice within the same sentence in order to take out of the exclusionary phrase "banking corporation" corporations not created or licensed to do business under federal or state laws. The appellees err in isolating the word "corporation" from the immediately preceding word that appears in Section 4 to wit "banking" in the first instance and "commercial" in the second instance, which in fact imparts to the word "corporation" its principal meaning. In proper context we must deal not with "corporation" but with "banking

corporation" and with "commercial corporation", each having a different meaning consistent with the context of the Act to be construed. "Commercial corporations" may file voluntary petitions and may be subjected to involuntary petitions. "Banking corporations" are excluded, but not defined, and within the purpose or objective of the Act do not embrace corporations created or licensed under the laws of a foreign nation and which never did business in the United States and whose only nexus therewith was the location of assets therein.

The cases cited at FDIC p. 9 to establish that the powers conferred on a corporation by the laws of its creation rather than its actual business activities are the test of whether a subject corporation was a "banking corporation" are entirely irrelevant to the issue in the case at bar. Each cited case deals with a corporation existing under a charter issued by a State of the United States, sovereign in its own right to create such powers. IBB is the creature of a *foreign nation,* and regardless of the power to act as a bank with which such foreign nation might have endowed it, IBB could not have performed those banking activities in the United States without having been licensed therefor. Not having been so licensed, it is merely a commercial corporation as to the Act and not a banking corporation. Hence, it is not excluded. It cannot seriously be argued that the determination of whether to include or exclude a foreign corporate entity authorized to engage in banking activities in *its* country should be determinative of whether said corporate entity is a "banking corporation" within the meaning of Section 4. The only test to be applied with respect to whether or not this court has jurisdiction over IBB under the Act is whether or not it has assets within the jurisdiction. The fact that it may have been a railroad corporation, a banking corporation or an insurance corpo-

ration under the laws of the foreign country which gave it its birth is a wholly irrelevant consideration where it never did business in the United States.

POINT II

Response to various other arguments made by FDIC and Commonwealth in their briefs.

A. At Page 11 of the Commonwealth brief reference is made to *In re People of the State of New York (The City Equitable Fire Insurance Co., Ltd.)*, 238 N.Y. 147 (1924).

Commonwealth relies heavily on the quoted opinion of the New York State Court of Appeals because the case allegedly "presents a factual situation not dissimilar to the one at bar. City Equitable was an English insurance corporation in the process of being wound up pursuant to the British Companies Act."

Here again, Commonwealth has failed to recognize and address itself to the essential thrust of the issue before this court. Even a casual reading of that case discloses that the English insurance corporation had, in fact, qualified to and had actually done business as an insurance company in the State of New York, thereby subjecting itself to the jurisdiction of the State and its particular statutory provisions applicable to the liquidation of insurance corporations.

IBB concedes that City Equitable could not have sought relief under the Act if that issue had been raised in the case. It was not. Moreover, the distinction between that case and the one at bar frames the issue before this Court. While a foreign corporation authorized by a State

or the United States to conduct a business of the type excluded by Sec. 4 may not seek relief under the Act, a foreign corporation such as IBB which never conducted any business in the United States, and which only had assets within the United States does not come within the language of the exclusion.

B. Under Point I. C of its brief (pp. 11-13) FDIC contends that IBB's contention that pursuant to Sec. 2a(1) of the Act "location of assets within the United States is sufficient to give bankruptcy jurisdiction" is untenable. Although FDIC states at page 11 that this argument has been rejected by the United States Supreme Court, there is no citation to support this statement. Equally erroneous is the statement by FDIC that this argument has been rejected by the court below. As appears from footnote 2 to the decision and order below, the court failed to consider IBB's contention.

Section 2a(1) of the Bankruptcy Act confers upon the Bankruptcy Court jurisdiction to adjudge persons bankrupt "who do not have their principal place of business, reside or have their domicile within the United States but have property within their jurisdiction * * *". (See Addendum, IBB p. 43).

IBB alleged as a predicate for the jurisdiction of the Bankruptcy Court to adjudge it a bankrupt the location of property in the United States and relied upon Section 2a(1) of the Act and Rule 116(a)(2)(B) of the Rules of Bankruptcy Procedure in support thereof. (A-4, 6).

At page 5 of its decision (A-57) the court below appears to recognize this when it states:

> "Another section of the Bankruptcy Act highlights the fact that the actual business of a corporation in

> the United States is unimportant for jurisdictional purposes. According to Sec. 2 of the Act, the Bankruptcy Court has jurisdiction as a general matter over foreign persons and corporations solely on the basis of their having property located in the United States. 11 U.S.C. Sec. 11a(1). The presence of assets—not the corporate activities within this country—is the predicate for jurisdiction over foreign corporations."

However, in a footnote to this statement (footnote 2, page i (A-86)), the court below says:

> "The dispute as to whether Sec. 2a(1) is a jurisdictional or venue statute (see e.g., *Bass* v. *Hutchins*, 417 F. 2d 692 (5th Cir. 1969); *In re Eatherton*, 271 F. 2d 199 (8th Cir. 1959) is irrelevant to the issue at hand because the predicate of jurisdiction, if any, in this case is Sec. 4."

It is respectfully submitted that the court below erred in considering irrelevant the dispute as to whether Sec. 2a(1) is a jurisdictional or a venue statute. It is IBB's contention that clause 2 of Section 2a(1) is a jurisdictional provision and not a venue provision and as such, constitutes a jurisdictional basis for adjudging IBB a bankrupt, independent of Section 4 of the Bankruptcy Act.

In discussing the question whether Section 2a(1) is a jurisdictional or a venue statute, the Advisory Committee's Note to Bankruptcy Rule 116* states:

> "Subdivision (a). Paragraphs (1) and (2) of subdivision (a) of this rule are a revision of §2a(1) of

---

* The Rules of Bankruptcy Procedure govern practice and procedure under the Bankruptcy Act and are not intended to abridge, enlarge or modify any substantive right. 28 U.S.C. §2075. They are not to be construed to extend or limit the jurisdiction of courts of bankruptcy over subject matter. Bankruptcy Rule 928.

> the Act. Although the statutory provision is phrased in terms of jurisdiction, it is now settled that it relates primarily to venue insofar as it speaks of principal place of business, residence or domicile. *Bass* v. *Hutchins,* 417 F. 2d 692, 694-95 (5th Cir. 1969); *In re Eatherton,* 271 F. 2d 199, 201-03 (8th Cir. 1959); Seligson & King, *Jurisdiction and Venue in Bankruptcy,* 36 Ref. J. 36 (1962). *The statutory reference to 'property within their jurisdiction' may be viewed as establishing jurisdiction as well as prescribing venue."* (emphasis added)

In re Eatherton, 271 F. 2d 199 (8th Cir. 1959) and *Bass* v. *Hutchins,* 417 F. 2d 692 (5th Cir. 1969) both referred to in the footnote to the court's decision above quoted and in the quotation from Bankruptcy Rule 116 are readily distinguishable from the case at bar. Both cases dealt with that clause of Sec. 2a(1) relating to principal place of business, residence or domicile and not with the clause relied upon in the instant case relating to the location of assets in the district.

There is respectable authority to support the proposition that under the present Bankruptcy Act, location of assets within the district is sufficient to give bankruptcy jurisdiction (see IBB pp. 34-38).

C. Both FDIC and Commonwealth place great reliance on the case of *Clark* v. *Williard,* 292 U.S. 112 (1934), 294 U.S. 211 (1935). That case is not dispositive of the issue presented in the instant case. In *Clark* v. *Williard,* the basis for attacking the inequity was on Constitutional grounds. All the Supreme Court said in effect was that the Constitution does not forbid unequal treatment of creditors. The question herein presented was neither raised nor considered in *Clark* v. *Williard.* The fact that

an unfair result is accepted on the interstate level does not preclude eliminating the inequity by a proper interpretation of the Bankruptcy Act as it was written in 1898.

D. At page 5 of its brief Commonwealth states:

"IBB concedes (Br. at p. 34) that

'Congress at the time of the enactment of the exceptions to Section 4 also had in mind foreign corporations.'".

This quotation is misleading since it merely constitutes the quotation out of context of the heading to Point II. E. A reading of the textual material below the point heading makes it abundantly clear that the point heading was intended to be applicable to a foreign person or corporation whose only connection with the United States, as in the instant case, is the location of assets therein.

E. The footnote at page 32 of the FDIC brief wherein reference is made to *In the Matter of Banque de Financement, S.A.*, 75 B 764 (S.D.N.Y., Jan. 12, 1976) is misleading. Particularly so is the last sentence to the footnote wherein it is stated: "Apparently Judge Babitt was untroubled by this clear operative effect of Section 4." Judge Babitt clearly stated:

> "This issue does not, therefore, present a slate free of prior judicial instruction, and my duty, as an inferior Court, is to apply, as best I can, the legal gloss placed on identical facts by my judicial superiors. See *U.S.* v. *A Motion Picture Film entitled 'I Am Curious Yellow'*, 404 F. 2d 196 (2d Cir. 1968) Friendly, C.J. concurring at 200." Opinion at p. 7.

It is evident from the foregoing statement and Judge Babitt's citation from Judge Friendly's concurring opinion

that he felt constrained to follow Judge Lasker's decision. His constraint is further evidenced by his statement: "I am obliged to follow the rule of law * * *". *Id.*

CONCLUSION

For the reasons set forth in IBB's main brief and above, the decision and order appealed from should be reversed on the law.

Respectfully submitted,

KRAUSE, HIRSCH & GROSS
Attorneys for Appellant,
Israel-British Bank
(London) Limited

Of Counsel:

JACK GROSS
SHELDON LOWE
BRUCE L. HELLER

Service of 2 copies of this within
Reply Brief is admitted this
26 day of February 1976.

ATTORNEY FOR appellee's

COPY RECEIVED
FEB 26 1976
CADWALADER, WICKERSHAM & TAFT
ATTORNEYS FOR

Attorney for

2 copies
COPY RECEIVED
Bernard Jacoby
BY [signature]
DATE 2/26/76
TIME 3 pm